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CASES IN EQUITY THAT BECOME MOOT ON APPEAL. — Suits in Equity that are important to-day may cease to possess actuality next week. Because of slow appellate procedure within the courts and a change of circumstances outside, a live issue may become an apparently moot one before an appeal can be heard. Recently, for example,[1] certain mine-owners in North Dakota sought to enjoin the governor's operation of their mines by troops; the injunction was refused and plaintiff appealed. Eight months later when the Circuit Court of Appeals heard the case, the mines had been restored to the owners.[2] What, then, was to be done with the case? The court followed the weight of authority, and held there was no question on the merits calling for a decision.[3]

This view[4] seems at first too plausible for argument or discussion.

[1] Dakota Coal Co. *v.* Fraser, Adjutant General, 267 Fed. (C. C. A.) 130 (1920). See RECENT CASES, p. 433, *infra*.

[2] Courts either take judicial notice of the fact of the change or ascertain it from affidavits or other evidence. See Jones *v.* Montague, 194 U. S. 147, 153 (1904); Turner *v.* Markham, 156 Cal. 68, 103 Pac. 319 (1909); Vollman *v.* I. W. W., 79 Wash. 192, 140 Pac. 337 (1914).

[3] The procedure here is to be noted. Dismissal of the appeal may bar certain of appellant's rights in the future, — as for damages, by affirming the judgment. Gulf Ry. Co. *v.* Dennis, 224 U. S. 503 (1912). A clear and correct form of decree is: "Order is reversed and cause remanded to the court below with directions to dismiss the petition without costs to either party, and without prejudice to the rights of the complainants." See United States *v.* Alaska Steamship Co., 40 Sup. Ct. 448, 449 (1920). The court in Davis *v.* Boyer, 122 Ia. 132, 97 N. W. 1002 (1904) failed to notice the question and affirmed the judgment. *Cf.* Dinsmore *v.* Southern Express Co., 183 U. S. 115 (1901).

[4] Mills *v.* Green, 159 U. S. 651 (1895); Jones *v.* Montague, *supra;* Security Mutual Life Ins. Co. *v.* Prewitt, 200 U. S. 446; Travelers Insurance Co. *v.* Same, 200 U. S.

But one's certainty is shaken when it is found that not only are the reasons for the rule somewhat hazy, but also that the rule has been denied in England and hedged in by exceptions in this country. In a leading English case,[5] an injunction was granted in the lower court; on appeal it had ceased to be vital whether defendant was enjoined or not. Yet the court passed on the merits, on the ground that defendant had a right to have it settled on appeal whether there had been a ground of complaint against him. In this country the ground given for the English decision has been overlooked, and the reasoning that has led to an opposite result is vague. It is of course everywhere recognized that a case will not be heard on the merits, merely to determine costs.[6] But the phrases, "ineffectual relief" [7] and "nothing on which the judgment of the court may operate," [8] merely travel in a circle. More definitely it has frequently been stated [9] that an actual controversy is necessary. Inasmuch as no case in the federal courts has ever mentioned the Federal Constitution in this connection, it seems there is no definite constitutional mandate against a decision on the merits.[10] Underlying all the

450 (1906); Richardson *v.* McChesney, 218 U. S. 487 (1910); United States *v.* Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 239 U. S. 466 (1916); Commercial Cable Co. *v.* Burleson, 250 U. S. 360 (1919); Davis *v.* Boyer, *supra;* Sebastian County *v.* Hocott, 217 S. W. (Ark.) 258 (1919); Smith *v.* Warrenfeltz, 116 Md. 116, 81 Atl. 275 (1911); Sasser *v.* Harriss, 178 N. C. 322, 100 S. E. 338 (1919); Ireland *v.* Sherman County, 75 Ore. 241, 146 Pac. 969 (1915); Winston *v.* Ladner, 264 Pa. 548, 108 Atl. 22 (1919); McCarty *v.* Natural Carbonic Gas Co., 122 App. Div. 257, 106 N. Y. Supp. 811 (1907). The change may be due not to extraneous circumstances but to change of statutes or judicial decision. New Orleans Flour Inspectors *v.* Glover, 160 U. S. 170 (1895); Burgess *v.* Crumpton, 93 S. C. 562, 77 S. E. 356 (1913). Or to acts of the parties. Singer Mfg. Co. *v.* Wright, 141 U. S. 696 (1891); Lewis Publ. Co. *v.* Wyman, 228 U. S. 610 (1913); Wright *v.* Los Angeles, 163 Cal. 328, 125 Pac. 353 (1912). *Cf.* Tucker *v.* Howard, 128 Mass. 361 (1880); Green *v.* Okanogan County, 60 Wash. 309, 111 Pac. 226 (1910).

[5] Inchbald *v.* Robinson, 4 Ch. App. 388 (1869). Another English case though involving interpretation of a statute in a suit by way of information reasons similarly from the danger of stigma on the defendant. Oaten *v.* Auty, [1919] 2 K. B. 278. Whether the English rule would be the same if the injunction were not granted below is somewhat doubtful. *Cf.* Inchbald *v.* Robinson, *supra,* 396.

[6] Matter of Croker *v.* Sturgis, 175 N. Y. 158, 67 N. E. 307 (1903); Wingert *v.* Bank of Hagerstown, 223 U. S. 670 (1912).

[7] See Mills *v.* Green, *supra,* 653.

[8] See Kimball *v.* Kimball, 174 U. S. 158, 163 (1899).

[9] See Richardson *v.* McChesney, *supra,* 492; South Spring Hill Co. *v.* Amador Medean Gold Mining Co., 145 U. S. 300, 301 (1892); Denver *v.* Brown, 47 Colo. 513, 514, 108 Pac. 971 (1910).

[10] See U. S. CONSTITUTION, Art. III, Sec. 2 (1): "The judicial power shall extend to all cases, in law and equity, arising etc. . . . to controversies" etc. That there has been a case or controversy at some time in the proceedings would seem to be enough. See, however, BLACK, HANDBOOK OF AMERICAN CONST. LAW, 3 ed., 82. The U. S. Supreme Court has always been careful not to decide suits that seemed to it academic. Lord *v.* Veazie, 8 How. (U. S.) 251 (1850) (fictitious suit); United States *v.* Evans, 213 U. S. 297 (1909) (interpretation of a criminal statute); Muskrat *v.* United States, 219 U. S. 346 (1911) (statute providing for a test case). Fictitious suits must be distinguished from so-called amicable suits where there is a real dispute but where the procedure and issue are facilitated by agreement. *Ex parte* Steele, 162 Fed. 694 (1908). Such cases suggest analogously the question of Advisory Opinions. See THAYER, LEGAL ESSAYS, 42; 2 STORY ON THE CONSTITUTION, 5 ed., 387–8; H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," 24 AM. L. REV. 369. And of Declaratory Judgments. See E. M. Borchard, "Constitutionality of the Declaratory Judgment," 30 YALE L. J. 161.

decisions, however, is the perhaps laudable fear that courts will waste valuable time in rendering opinions that will serve no practical purpose except the satisfaction of one litigant's will to win.[11]

But there are several exceptions to the American rule. Some courts will entertain appeals on election statutes because of the "public interest" even though the parties' rights can no longer be affected.[12] North Dakota will decide any moot question if sufficient public interest be involved.[13] Somewhat the same motive constrained a federal court to disregard all valid precedents and make such a decision in an Espionage Act case.[14] Finally the Supreme Court has consciously evolved two exceptions to its own rule of "hands off." In *United States* v. *Trans-Missouri Freight Ass'n*,[15] an injunction was sought against an illegal combination which by the time the case was heard on appeal had been dissolved by the defendants. In *So. Pacific Terminal Co.* v. *Young*,[16] the validity of an order against a preference under the Interstate Commerce Act was involved; the order, which was for two years only, had expired before the court's decision. But in both cases a decision was made on the merits: in the first, because of practical danger from the mere voluntary cessation of wrong by the defendants; in the second, because of the continuing nature of the wrong. Each seems to reach a correct result, and other cases are in accord.[17] Subsequently, however, the court failed to follow its own leadership and refused to consider an anti-trust suit,[18] where the combination was temporarily non-existent because of the war; and the distinction the court drew between voluntary and involuntary cessation seems insufficient. Thus, once the flat rule of never considering such cases is departed from, anomalies are apparently inevitable.

But these decisions make at least one thing clear. No dogmatic principle can be asserted. Any rule of procedure, as general in nature as this, should tend to be elastic. Courts should not peremptorily refuse to decide on the merits, but should balance conveniences — the danger

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[11] Searcy *v.* Fayette Home Telephone Co., 143 Ky. 811, 137 S. W. 777 (1911); State *ex rel.* Jones *v.* Miller, 221 S. W. (Mo.) 88 (1920).

[12] Matter of Madden, 148 N. Y. 136, 42 N. E. 534 (1895); Matter of Fairchild, 151 N. Y. 359, 45 N. E. 943 (1897); O'Laughlin *v.* Carlson, 30 N. D. 213, 152 N. W. 675 (1915). See also in *accord* Barrs *v.* Peacock, 65 Fla. 12, 15, 61 So. 118 (1913); Keller *v.* Rewers, 127 N. E. (Ind.) 149 (1920).

[13] State *v.* Stutsman, 24 N. D. 68, 139 N. W. 83 (1912).

[14] Masses Publishing Co. *v.* Patten, 246 Fed. 24 (1917), 244 Fed. 535 (1917). The plaintiff sought to enjoin the postmaster of New York City from excluding an issue of the "Masses" from the mails. An injunction was granted but later stayed. In the interim all the copies were sent out by express. 245 Fed. 102 (1917). Yet the Circuit Court of Appeals decided on the merits. That this decision, moreover, was one of the important precedents in the interpretation of the Espionage Act, see Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 960–965.

[15] 166 U. S. 290 (1897). The decision of the case was perhaps made easier because of the nature of the bill, — to restrain such or any like action.

[16] 219 U. S. 498 (1911).

[17] Close *v.* Southern Maryland Agricultural Ass'n, 108 Atl. (Md.) 209 (1919); Boise City Irrigation Co. *v.* Clark, 131 Fed. 415 (1904).

[18] United States *v.* Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, *supra*. See also in *accord*, United States *v.* American-Asiatic Steamship Co., 242 U. S. 537 (1917).

of poor presentation, the value of the court's time on one side, and on the other the danger of having almost identical litigation brought up again in the near future. On such considerations, the decision in *Dakota Coal Co.* v. *Fraser* is undoubtedly correct; but if it appeared that the same situation were likely to be repeated soon, there should be nothing to prevent the court's passing on the propriety of granting the injunction. The real problem, however, is not whether to pass on the merits after circumstances have changed; the problem is how to get the appeal to the upper court before those circumstances have changed.[19] Unless appeals are to be abolished altogether,[20] it must be recognized that in a great number of cases a delayed appeal, especially on an interlocutory injunction, is as good as no appeal at all.[21] The question of moot appeals in equity leads to the roots of procedural reform.

THE CONSTITUTIONALITY OF BUILDING LINES FOR AESTHETIC PURPOSES. — How far will the courts go in recognizing the validity of building lines imposed without compensation? An answer to the question is unavoidable in view of the popular demand for building restrictions, zoning systems, and civic improvements in general.

It is clear that the building line deprives the owner of a property right,[1] but it is equally clear that if the restriction can be brought within a proper exercise of the police power, compensation is unnecessary.[2] However nebulous this police power may be, it may fairly be said to extend to the protection of the public health, morals, and safety, and to the promotion of the general welfare.[3] It is true that if property is taken under the right of eminent domain, compensation is a constitu-

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[19] See PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE PREPARED FOR THE NATIONAL ECONOMIC LEAGUE, 28; Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 REPORTS OF AMERICAN BAR ASS'N, Part I, 395, 409–411; C. W. Eliot, "The Popular Dissatisfaction with the Administration of Justice in the United States," 45 CHIC. LEG. NEWS, 207; R. H. SMITH, JUSTICE AND THE POOR, 2 ed., 19.

[20] See WORKS, JURIDICAL REFORM, 86, for such a proposal. See 33 HARV. L. REV. 326, for comment thereon by Roscoe Pound, and alternative suggestions as to the remedies for slow appeals. See also Roscoe Pound, "Bibliography of Procedural Reform," 11 ILL. L. REV. 451.

[21] For examples of slow appeals see New Orleans Flour Inspectors *v.* Glover, *supra;* Keller *v.* Rewers, *supra.* The Federal Judicial Code makes an attempt to accelerate appeals. See JUD. CODE, § 129; BARNES, FEDERAL CODE (1919), § 894.

[1] For a discussion of what is a taking or deprivation of property, see Old Colony & Fall River R. R. Co. *v.* Inhabitants of Plymouth, 14 Gray (Mass.), 155 (1859); Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166 (1871); Eton *v.* B. C. & M. R. R., 51 N. H. 504 (1872). For a discussion of the nature of property rights, see Everett V. Abbot, "The Police Power and the Right to Compensation," 3 HARV. L. REV. 189. See NOTE, "Actionable Injuries in Street Regulations," 33 HARV. L. REV. 451, 452.

[2] Mugler *v.* Kansas, 123 U. S. 623 (1887); C. B. & Q. Ry. Co. *v.* People, 200 U. S. 561 (1906). See 1 LEWIS, EMINENT DOMAIN, 2 ed., § 6.

[3] Beer Co. *v.* Mass., 97 U. S. 25 (1877); Crowley *v.* Christensen, 137 U. S. 86 (1890); C. B. & Q. Ry. Co. *v.* People, *supra.* It is of course true that the use of the term, "police power" has been attended by an unfortunate confusion of meaning. Its meaning oftentimes raises simply a question of the true limits of legislative power in general. See THAYER, LEGAL ESSAYS, p. 27, note 1.